

It was *alleged* for the Earl of Kelly, as assignee to the youngest sister, That by the posterior dispositions upon which Mr Duncan was infeft, and had possessed the lands, the original destination was altered in favours of heirs whatsoever.

*Answered* for the eldest sister and her husband, That these dispositions being but private conveyances from vassals, upon which only base infeftments had followed, they could not be deemed an alteration of the original destination by the superior, who had done no deed confirming these posterior rights; and since the superior had so anxiously provided against splitting his feu, heirs whatsoever in the latter conveyances were to be understood the heirs of investiture, and such as the superior could have been obliged to receive as vassals in the subject disposed, viz. heirs-female without division.

*Replied* for the Earl, That by heirs whatsoever are always understood heirs at law, and consequently, where the succession devolves on females, heirs-portioners; and since the later dispositions, on which Mr Duncan was infeft, were taken to heirs whatsoever, he showed his intention that his heirs at law should succeed him, as much as if he had disposed his lands to all his sisters equally, in which case, they, as creditors, might have adjudged, and so obliged the superior to receive them. As to what prejudice the superior may sustain from the original destinations being altered, that was *jus tertii* to the defenders.

THE LORDS found it proved by the writs produced, that the destination was altered in favours of heirs and assignees whatsoever

Act. Graham, sen.

Alt. Hay & Murray.

Clerk, Justice.

Edgar, p. 181.

1728. November 26. FRASER against M'KENZIE.

IN a ranking and sale of the lands of Pitcalzean, the subject in competition was an apprising of these lands, led by Campbell of Boghole 1675, of which there were two conveyances, one voluntary from Boghole to Auchlossin 1680, the other by an adjudication at the instance of Campbell of Calder, against the heir of Boghole, 1700. The voluntary right being evidently preferable, it was objected by the legal disponee, who had done diligence upon Boghole's apprising, whereby it was saved from the negative prescription, That his competitor's right was fallen *non utendo*, no document having been taken upon it since it was granted. It was *answered*, This objection is competent to any real creditor upon the estate of Pitcalzean, whose interest it would be to have Boghole's apprising cut down, but not competent to any one claiming under Boghole's apprising; for if the apprising be extinguished, there is an end of the

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ultimately into the person of one proprietor, who dying without heirs of his own body, it was decided among his sisters, that the after-conveyances were, by prescription, now the rule of succession.

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question as to both ; if it subsist, it must subsist in his person who has the only right to the same. *Replied*, Prescription is no other than a personal exception ; it is not a real extinction, like payment, to cut down the debt ; and therefore, though the voluntary assignee be excluded, because of his negligence, the apprising may well subsist to be taken up by any person who can connect a title to it. THE LORDS found the conveyance of the apprising by Boghole to Auchlossin prescribed *non utendo*.

*Fol. Dic. v. 2. p. 97.*

1746. November 19. and 1747. January 27.

JACOBINA CLERK against The EARL of HOME.

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The nature of an apprising, and particularly, if possession of a part of the appraised lands by the appriser or his assignee, will preserve against the negative prescription as to the rest.

HELEN TROTTER appraised the estate of Home in 1655 ; and in 1724, Major Clerk adjudged this apprising from Helen Trotter's grand-child, upon a decret *cognitionis causa*, and thereon Jacobina Clerk his daughter pursues an action of mails and duties.

In which the Earl of Home having compeared, and *pleaded*, That Helen Trotter's apprising was prescribed ; and the pursuer having replied upon interruption, the LORDS, after hearing parties, " found the reply of interruption not proved, and sustained the defence of prescription."

A variety of things were thrown out in this case, many of them from the Bench, which deserve to be taken notice of, although they did not receive special interlocutors, the interlocutor being only in general, as has been said.

And *first*, it was for the pursuer *pleaded*, that as an apprising was of its nature a right of property, a sale under reversion, and, after expiry of the legal ; a right absolute and irredeemable, it could not be lost by the negative prescription ; as the negative prescription lay only against a debt or obligation, and that rights of property were not the subject of the negative, but only of the positive prescription.

And *esto* the negative prescription were competent to be alleged against a right of property, it could only be competent to one who could plead the positive prescription : And as to the positive prescription, there were not habile terms for it in this case, as the Earl of Home, the heir of the debtor, against whom the apprising was led, could not plead a positive prescription on the ancient titles of the family, of which they were divested by the apprising and infestment following on it.

With respect to the first, the negative prescription of rights of property, it was admitted, that an apprising was in its nature a right of property, a sale under reversion, and absolute after expiry of the legal. But *answered*, That all claim upon right of property was lost *non utendo*, as well as action upon obligations ; for which the letter of the act 1617 was referred to, where it is sta-